Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re	)	
	)	
Review of the Syndication and Financial Interest Rules, Sections 73.659 - 73.663 of the Commission's Rules	)	MM Docket No. 95-39

To: The Commission

REPLY COMMENTS OF CAPITAL CITIES/ABC, INC.

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Capital Cities/ABC, Inc. ("Capital Cities/ABC"), owner and operator of the ABC Television Network ("ABC") and of eight television broadcast stations, replies as follows to the comments in the above proceeding that urge an extension of the November 1995 sunset on the remaining fin/syn restraints or the adoption of fin/syn restraints that do not now exist:[1/]

Introduction and Summary

The Notice of Proposed Rule Making in this proceeding ("Notice") was issued to provide fin/syn proponents with one last, albeit limited, chance to convince the Commission that events since 1993 have undermined the Commission's central finding that no network can exert significant market power over program suppliers. Notice, ¶ 12. The

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1/ Specifically, we reply to the comments of the Association of Independent Television Stations, Inc. ("INTV" and "INTV Comments"), King World Productions, Inc. ("King World" and "King World Comments") and the Coalition to Preserve the Financial Interest and Syndication Rule ("the Coalition" and "Coalition Comments).

Commission did not invite mere reargument of its 1993 decision to eliminate all fin/syn restraints (on a staggered schedule).[2/] To the contrary, it imposed the burden of proof on fin/syn supporters, recognized that the Seventh Circuit's mandate would require them to show "'an excellent, a compelling reason' why the restrictions should con tinue,"[3/] and warned them that they "should support their positions with empirical data and economic analysis."[4/]

The startling fact is that neither the Coalition nor INTV nor King World has supplied any new economic analysis or empirical data that go in any material way to the issue of network market power. All three instead quarrel with the judgments that the Commission reached in 1993, which were affirmed by the Seventh Circuit.

The Coalition also makes a transparent effort to evade the burden of proof, on the basis of its claim that full network competition in the financing of prime time network series -- the door to which was opened after more than two decades in November 1993 -- has not yet produced tangible benefits. The claim does not address the market power question. Moreover, even if the claim were accurate

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2/ Second Report and Order, MM Docket No. 90-162, 8 FCC Rcd 3282 ("1993 Report"), recon., 8 FCC Rcd 8270 (1993) ("1993 Recon Order"), aff'd sub nom. Capital Cities/ABC, Inc. v. FCC, 29 F.3d 309 (7th Cir. 1994) ("Capital Cities/ABC").

3/ Notice, ¶ 13.

4/ Id. at ¶ 12.

-- and it is not -- the Commission does not demand that competition produce immediate or tangible benefits. It did not take that cramped approach to competition in 1993 and could not, consistent with fundamental statutory policy, do so now.

I. The Coalition Provides No Justification for the Abrupt Reversal of the 1993 Decisions That It Urges

The Coalition urges the Commission to abandon the scheduled sunset (retaining the syndication restraints), to restore and tighten the program acquisition restraints and to add a new rule barring each of the original networks from acquiring any option to renew a prime time entertainment series for more than four years from the commencement of its network run.[5/] One would expect a party urging so complete and sudden a reversal of the Commission's course to point to dramatic new developments or evidence and to support its case with rigorous new economic analysis. But the Coalition's showing on the critical issue of network market power lacks any such elements.

The Coalition says nothing at all about "market trends" since 1993 that might refute or confirm the finding that no network has significant market power and it supplies

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5/ Coalition Comments at 20-22.

no new economic analysis.[6/] Further, it does not allege that any network has "extracted" any financial interest from a producer in any instance. It claims only that networks have obtained financial interests "either through co-productions or in-house productions" in "approximately 40 percent of new shows picked up since the Commission eliminated the financial interest rule in 1993."[7/] The time period to which this allegation vaguely refers is quite unclear.[8/] In any case, even if the allegation were correct, it would show at most that a majority of the new shows that have entered the schedules of the original networks have accomplished that feat without any ownership

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[6/] The Coalition's apparent position is that nothing significant has changed, see Coalition Comments at 15, and that its previously rejected economic analyses should now be accepted, see id. at 2 n.2 & Ex. 1.

[7/] Id. at 17. The Coalition also claims that the networks "will have a financial interest in over 30 percent of the entire prime time schedule" for fall 1995. Id. at 17-18 (emphasis in original). This contention treats network-produced news, public affairs and sports programs (such as NFL football) as programming in which networks have "a financial interest." But the fin/syn rules were never designed to restrict, and never did restrict, such network productions. And the Commission's 1991 fin/syn decision (which the Coalition generally supports) eliminated any restraints on network acquisition of interests in independently produced non-entertainment shows. See Report and Order, MM Docket No. 90-162, 6 FCC Rcd 3094, 3102-03 (1991).

[8/] The Coalition has not yet analyzed data "concerning copyright ownership of prime time entertainment programs for the Fall 1995/96 season" (id. at 13 n.29); its assertion about financial interests in the "entire" prime time schedule refers explicitly to the fall 1995 schedules. There is no way to tell whether its other statements about network financial interests include the fall 1995 schedules or not.

interest by the relevant network. Such a pattern would not suggest the existence of any power to "extract."

The Coalition also claims that there has been a reduction since 1993 in license fees paid by networks for prime time entertainment series,[9/] and that this reduction reflects an exercise of market power.[10/] The Coalition provides no factual support for the claimed reduction.[11/] More important, it supplies no reason to believe that any reduction that may have occurred reflects anything but competitive forces.[12/]

9/ Id. at 11.

10/ Id. at 17.

11/ No source is given for its assertions as to what producers received in 1993 and receive today. Nor does the Coalition explain the basis for its comparisons -- e.g., how it determined what a producer "who received $625,000 per episode in 1993" (Coalition Comments at 11, emphasis in original) would receive today. This hole in its submission is critical, for there is a wide dispersion in the license fees paid for different shows of the same length, both among networks and within the schedule of any given network. See Economists Incorporated "Report on Series Pricing," Joint Economic Appendix, filed Aug.1, 1990, in MM Docket No. 90-162, at tab B.

12/ The Coalition says that the alleged reduction in license fees has occurred at a time when "the costs of inputs into the production process are rising and the networks' revenues and profits are escalating" (Coalition Comments at 17). The allegation, even if credited, suggests only the normal supplier-network dispute about the division of the profits of their joint activity. See Network Inquiry Special Staff, New Television Networks: Entry, Jurisdiction, Ownership and Regulation ("New Television Networks"), vol.II at 728 (". . . the dispute about 'deficit financing' which has so frequently dominated discussions about the network program supply business is, at bottom, another species of the more general debate between networks and program suppliers about the division of advertising revenues.").

Third, the Coalition attempts to build an argument on the showing by the economic consultant to the original networks in MM Docket No. 94-123, Review of the Prime Time Access Rule, of audience losses flowing from the forced substitution of first-run syndicated programming for network programming during the access period. That showing demonstrates, the Coalition says, that first-run syndicated programs are not adequate substitutes for prime time network entertainment programs, and thus undermines the Commission's 1993 finding that networks lack significant market power in program acquisition.[13/]

The argument borders on the frivolous. To the extent that the Commission relied on first-run syndication as competition for each network in program purchasing, it referred -- not to the cheaper game and talk shows that first-run syndicators have supplied in the sheltered market created by the prime time access rule[14/] -- but to the expensive action dramas that they now supply in direct competition with network prime time entertainment.[15/] Further, first-run syndicators need not be perfect substitutes for each network as program purchasers to act as

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13/ See Coalition Comments at 15-17.

14/ See Reply Comments of Capital Cities/ABC, Inc., MM Docket No. 94-123, filed May 26, 1995, at 17-18, 26-29.

15/ See 1993 Report, 8 FCC Rcd at 3306 ¶ 47.

competitive constraints on network conduct.[16] And the availability of first-run syndication as an alternative for program producers was only one of the competitive factors on which the Commission relied. The Coalition ignores here, as it did in 1993, the intensity of competition among the original networks, the competition provided by Fox and cable program services, and the emergence of new broadcast television networks.[17]

In short, the Coalition's showing, woefully devoid of empirical data or economic analysis, is obviously insufficient under the Notice to warrant continued regulation,

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[16] See U.S. v. E.I. Dupont de Nemours & Co., 351 U.S. 377, 401 (1956) (disparities in price between cellophane and other wrapping materials did not warrant excluding less costly materials from the relevant market); Twin Cities Sportservice, Inc. v. Charles O. Finley & Co., 512 F.2d 1264, 1274 (9th Cir. 1975) (citing Dupont), after remand, 676 F.2d 1291 (9th Cir.), cert. denied, 459 U.S. 1009 (1982). As the Commission pointed out in the 1993 Recon Order, 8 FCC Rcd at 8286 ¶ 34, its appropriate focus "is not on whether producers would generally prefer to strike deals with one of the established networks, but rather whether the overall demand for programming in the broadcast and cable marketplace limits a network's ability to control the market or dictate prices for prime time entertainment programs."

[17] See 1993 Recon Order, 8 FCC Rcd at 8286-88. The Coalition dismisses Fox with the assertion that it "has simply fallen in line behind ABC, CBS and NBC, offering no more favorable terms for the purchase of prime time programs" (Coalition Comments at 15 n.35). Similarly, in the Coalition's view, UPN and the Warner network "do not yet (and may never) place a significant competitive constraint on the established networks," in light of their "limited schedules and less than nationwide reach" (id. at 18 n.43). That Fox offers terms as favorable as those offered by the original networks demonstrates the reality of the competition it now provides. In both instances, moreover, the Coalition simply refuses to recognize the role of potential competition. See 1993 Recon Order, 8 FCC Rcd at 8286-7.

much less the reversal of Commission policy that the Coalition seeks. And so it invents a new standard. The 1993 decision to repeal restraints on network acquisition of financial interests was entirely predicated, the Coalition asserts, on the expectation that specified public benefits would materialize within two years.[18/] Charging that none of these benefits has materialized, the Coalition argues that this showing warrants a reversal of the Commission's course.[19/]

This attempt to answer a direct question by changing the subject cannot succeed. Even if it were accurate, the Coalition's assessment of the post-1993 record would say nothing about the critical question of network market power. The Coalition's account, moreover, seriously undersells the extent to which the benefits of competition have in fact

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18/ See Coalition Comments at 7, 10-11, 12, 13.

19/ On this basis, the Coalition urges de novo consideration of its claims (rejected by the Commission in 1993) that the original networks can exert market power against their program suppliers and that fin/syn restraints can effectively protect suppliers against that practice. Id. at 2, 15-19. Thus, it announces its disagreement with the Commission's 1993 assessment (id. at 15) and asks the Commission -- "particularly those commissioners who did not participate in [the 1993] proceeding" (id. at 2 n.2) -- to disregard the 1993 findings and consider afresh, not only its 1993 (and earlier) economic analyses (id., Exhibit 1), but "excerpted portions of our earlier filings"(id. at 2 n.2).

appeared,[20] and inaccurately asserts the existence of a trend toward declining diversity of network program sources.[21]

But the Coalition's ploy must in any case fail, for the standard it has invented is plainly not the criterion on which the fin/syn repeal was made to turn, let alone a standard that might provide an "excellent" or "compelling" reason for continued and expanded restraints.

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[20] New program series production entities have typically been founded, not by total neophytes, but by individuals who have earned their credentials by working for a studio or other established producer and need investment capital to sustain their new enterprises. See New Television Networks, vol. II at 328-34, 350-52. Considered in this light, ABC's joint ventures with Brillstein-Grey and DreamWorks SKG (see Coalition Comments at 8-9) plainly promote competition, diversity and investment in program production. Indeed, both DreamWorks and Brillstein-Grey have bid aggressively for talent, provoking studio executives to complain that ABC is "indirectly helping fuel a new boom in prices paid to television producers," and that the development "will inevitably drive up the cost of producing TV programs." "Alphabet Web Ups Ante," Variety, March 13 - March 19, 1995, at 29. The DreamWorks transaction, moreover, has opened up new vistas in the relationships between networks and all program suppliers by providing for a sharing of both program ownership and, in certain circumstances, network advertising revenues. See "ABC Deal Signals New Era," Electronic Media, Dec. 5, 1994, at 1.

[21] It is far too early to measure the impact of the 1993 decision (and the appearance of new sources such as Brillstein-Grey and Dreamworks) on the diversity of sources in network program supply. In any case, contrary to the Coalition Comments (at 13), the collective share of the original networks in entertainment series hours broadcast by them was 20% in 1992-93 and 19% in 1993-4, rose to 26% in 1994-95 and declined to 22% in the fall 1995 network schedules. See Economists Incorporated, An Economic Analysis of the Prime Time Access Rule, MM Docket No. 94-123, Appendix E (revised and updated by letter dated June 12, 1995 from Michael G. Baumann). No trend can be discerned in these facts.

The Commission did not expect network competition in the financing of program "deficits" to produce benefits immediately, within two years or within any particular period. It scheduled this review proceeding, rather, to test its prediction that "abuses will not occur"[22] -- that network behavior in program acquisition would not "reflect an unanticipated degree of market power" and thereby undermine "our overall marketplace analysis"[23] or suggest the likelihood of anticompetitive behavior in syndication.[24]

Moreover, the approach to deregulation that the Coalition attributes to the Commission would be directly at odds with fundamental policies. Even in common carrier fields, the Commission does not demand that competition produce either "immediate" or "tangible" benefits.[25] It requires at most "ground for reasonable expectation that competition may have some beneficial effect."[26] The statutory and regulatory commitment to competition in broadcast-

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[22] 1993 Report, 8 FCC Rcd at 3338 n. 149. As we have noted, the Commission also proposed to examine pertinent market trends.

[23] 1993 Recon Order, 8 FCC Rcd at 8281 ¶ 21.

[24] Id. at 8293 ¶ 51. The Commission was interested, for example, in whether "the networks have, contrary to our predictions, acquired the syndication rights to most attractive network programs." Id.

[25] See FCC v. RCA Communications, Inc., 346 U.S. 86, 97 (1953).

[26] Id.

ing is considerably stronger and more sweeping.[27] That commitment necessarily imposes on the opponents of competition the burden of proving that the competitive course harms the public. It cannot be reconciled with a practice of opening the door to competition, only to slam it shut if "tangible benefits" do not immediately appear.

In sum, the Coalition cannot evade the burden of proof by casting it on the proponents of competition. And it has utterly failed to carry the burden of showing that post-1993 events reflect either market power or incipient market power in the hands of the original networks.

II. INTV and King World Have Failed to Show Any Basis for Maintenance of the Restraints on Participation in Domestic Syndication by the Original Networks

Neither INTV nor King World supplies any economic analysis purporting to show, on the basis of structural trends or network behavior since 1993, that the Commission erred in deciding to terminate the restraints on network

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[27] See FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 474075 (1940); Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations, 3 FCC Rcd 638 (1988), recon., 4 FCC Rcd 2276 (1989).

participation in syndication.[28/] And neither supplies more than a smidgeon of empirical data concerning such factors.

Thus, INTV quotes a September 1994 article in Broadcasting & Cable to the effect that the in-house production units for ABC, CBS and NBC were collectively providing 14 hours of prime-time entertainment programming in the fall 1994 network schedules, and that this proportion was expected to increase.[29/] The proportion of in-house programming in the fall 1995 schedules of the original networks is lower than the proportion in the 1994-95 season.[30/] In any event, the relevance of INTV's assertion is at best obscure. If INTV means to suggest that the original networks have been accumulating a threatening share of the syndication rights to off-network "hits," it is simply wrong.

ABC holds the syndication rights in only one prime time entertainment series, broadcast of which began and ended before the 1994-95 season, that might now be described

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[28/] King World refers to an economic analysis submitted in MM Docket No. 94-123, Review of the Prime Time Access Rule. But it does so only to support the claim that "[t]he overwhelming preponderance of first-run programming, aired in prime time or otherwise, is carried on network-owned or network-affiliated stations." King World Comments at 7, citing the Economic Report submitted by The Law and Economics Consulting Group at 9-21 & 44. Nothing at the pages cited (or elsewhere in the Economic Report) supports that claim.

[29/] INTV Comments at 10.

[30/] See note 21, supra.

as syndicable.[31] It holds the syndication rights in three solely produced prime time entertainment series that were added to its schedule during the 1994-95 season, and one additional such series that was broadcast by CBS in the same season; none of those series was renewed for a second year.[32] Finally, the joint venture between ABC and Brillstein-Grey controls the syndication rights to two series in the fall 1995 ABC prime time schedule.[33] The syndication rights to all other series now on that schedule are held by other parties. This is not the conduct of a network bent on obtaining, or capable of obtaining, a corner on the rights to off-network "hits."

King World, on the other hand, alleges that 31 of the 44 stations that carried "Memories Then and Now," a failed NBC-produced first-run show, were NBC owned or affiliated.[34] This alleged pattern, according to King

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[31] ABC holds the syndication rights to 10 solely produced prime time entertainment series that were on its schedule during seasons from 1985-86 through 1993-94. Only one of these -- Moonlighting -- lasted more than one season. (ABC initially held the syndication rights in America's Funniest Home Videos, but those rights were later assigned to MTM.)

[32] The three series on the ABC schedule were My So-Called Life, McKenna and Me & The Boys; the single series in the CBS schedule was The Boys Are Back. The syndication rights to each of the four co-productions on the 1994-95 ABC schedule -- Blue Skys, On Our Own, A Whole New Ballgame and Extreme -- are held by the co-producer.

[33] These series are Wilde Again and Somewhere in America.

[34] King World Comments at 9.

World, reflects exploitation by NBC of "power over the distribution system upon which first-run programming critically depends."[35] King World does not suggest that NBC had anything to do with the clearance of "Memories Then and Now" by stations other than its own. In any event, the clearance of a program by only 31 of the over 200 NBC affiliates hardly suggests any ability by NBC to achieve nationwide exposure for its first-run product through active or passive influence over its affiliates.[36]

For the most part, INTV and King World simply quarrel with the judgments the Commission reached when it decided to terminate the remaining fin/syn restraints.[37] Both tried but failed to persuade the Seventh Circuit that those judgments were arbitrary.[38] Both now rely on previ-

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[35] Id. at 10.

[36] Further, the distribution pattern for a failed program provides no support for any claim that NBC would "steer" a "hit" first-run show to its owned stations and affiliates.

[37] INTV says that the Commission's judgment with regard to off-network syndication was inadequately explained. INTV Comments at 9 n. 18. King World complains that the 1993 decision to terminate the syndication restraints did not "differentiate" between first-run and off-network syndication. King World Comments at 2. According to King World, the Commission's 1991 decision -- vacated in Schurz Communictions, Inc. v. FCC, 982 F.2d 1043 (7th Cir. 1992) -- did not make this "mistake" and "had it right." King World Comments at 2 & 4.

[38] King World complains that, "on the two occasions when the Court of Appeals reviewed the rules, its determinations were based entirely on network arguments applicable to the syndication of off-network, rather than first-run, programs." King World Comments at 2. But the

ously advanced concerns about network behavior in syndication that are said to be inconsistent with repeal. As shown in our opening comments, however, the Commission properly found such concerns insufficient in 1993 to warrant an indefinite continuation of the syndication restraints,[39] and that judgment has been strongly confirmed by post-1993 developments.[40]

King World, finally, cites the Seventh Circuit for the view that the remaining syndication restraints cause little harm to the original networks.[41] But the court was addressing the harm caused by the Commission's interim restraints.[42] It required "an excellent, a compelling reason" for any more than interim prolongation of those restrictions, "whose mismatch with the current situation in the broadcast industry becomes more evident by the day."[43] Like other restraints on competition, those restrictions in fact cause serious harm.[44] Given the utter failure of

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fact that the Court of Appeals found it unnecessary even to discuss King World's arguments does not obviate its rejection of those arguments.

[39] Comments of Capital Cities/ABC, Inc., filed May 30, 1995 ("CC-ABC Comments"), at 8-18.

[40] Id. at 5-8.

[41] King World Comments at 10.

[42] See Capital Cities/ABC, 29 F.3d at 315-16.

[43] Id. at 316.

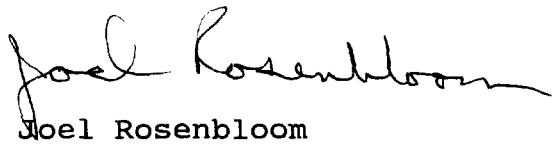
[44] See CC-ABC Comments at 13-14, 17-18.

fin/syn proponents to provide a plausible -- much less an excellent or compelling -- reason for continued regulation, the remaining restrictions should be terminated immediately.

CONCLUSION

For the foregoing reasons and those stated in our opening comments, the remaining fin/syn restraints should be immediately repealed and the Coalition's proposed new restraints should be rejected.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Joel Rosenbloom, hereby certify that on this 14th day of June, 1995, I have caused to be served by United States mail, first class postage prepaid, or by hand delivery, a copy of the foregoing Reply Comments of Capital Cities/ABC, Inc. to the parties on the attached service list.

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